

BYU Law Review

Volume 2010 | Issue 3

Article 12

3-1-2010

Religion and Law in Nepal

Kanak Bikram Thapa

Follow this and additional works at: <https://digitalcommons.law.byu.edu/lawreview>



Part of the [Comparative and Foreign Law Commons](#), [Human Rights Law Commons](#), and the [Religion Law Commons](#)

Recommended Citation

Kanak Bikram Thapa, *Religion and Law in Nepal*, 2010 BYU L. Rev. 921 (2010).
Available at: <https://digitalcommons.law.byu.edu/lawreview/vol2010/iss3/12>

This Article is brought to you for free and open access by the Brigham Young University Law Review at BYU Law Digital Commons. It has been accepted for inclusion in BYU Law Review by an authorized editor of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

Religion and Law in Nepal

*Kanak Bikram Thapa**

I. INTRODUCTION

Nepal is a multiracial, multilingual, multicultural, and multi-religious country with an estimated population of 27 million.¹ Hinduism is the predominant religion in Nepal. The 1981 census estimated that Hindus comprised 89.5% of the total population.² This percentage, however, has decreased over the past two decades. The 1991 census estimated that 86.5% of the population was Hindu,³ while the 2001 census estimated the percentage to be 80.6.⁴ This decline in percentage may be due to several reasons. First, the 1981 percentage was inflated due to fears of religious persecution—fears that subsided as democracy emerged.⁵ Second, frustration with the Hindu caste system caused a large conversion of Hindus—especially those belonging to the lower caste—to another religion.

The Interim Constitution of Nepal provides that “[e]very person shall have the right to profess, practise and preserve his or her own religion as handed down to him or her from ancient times paying due regard for social and cultural traditions”; yet, the Constitution also stipulates that no person shall be permitted to convert another person from one religion to another.⁶ Many (especially non-Hindus) oppose such a restriction and consider it a mockery. Rather, these

* Kanak Bikram Thapa is a professor of law and former dean at the Nepal Law Campus, T.U.

1. Department of Economic and Social Affairs, Statistics Division, *Population and Vital Statistics Report: Statistical Papers, Series A Vol. LXI, No. 2*, U.N. Doc. ST/ESA/STAT/SER.A/250-251 (July 1, 2009).

2. MAHENDRA LAWOTI, TOWARDS A DEMOCRATIC NEPAL: INCLUSIVE POLITICAL INSTITUTIONS FOR A MULTICULTURAL SOCIETY 88 (2005).

3. *Id.*

4. *Id.*; Nepal in Figures, 2008 [http://www.cbs.gov.np/Nepal in figure/Nepal in Figures eng 2008.pdf](http://www.cbs.gov.np/Nepal%20in%20figure/Nepal%20in%20Figures%20eng%202008.pdf).

5. See Sonia Eagle, *The Language Situation in Nepal*, in LANGUAGE PLANNING IN NEPAL, TAIWAN AND SWEDEN 4, 12 (Richard B. Baldauf Jr. & Robert B. Kaplan eds., 2000).

6. THE INTERIM CONSTITUTION OF NEPAL, 2063 (2007), pt. 3, art. 23(1), *available at* <http://www.unmin.org.np/downloads/keydocs/Interim.Constitution.Bilingual.UNDP.pdf>.

non-Hindus believe that everyone should have the freedom to choose whichever religion he or she wishes to practice.

II. RELIGION IN NEPALESE LAWS BEFORE THE UNIFICATION OF NEPAL

From the ancient period until the establishment of democracy in 1951, Nepalese laws were based on religion, local customs and usages, and royal edicts.⁷ In fact, law was considered a branch of religion. Prior to the codification of the Country Code (Muluki Ain) of 1854, the legal system of Nepal was very much influenced by religion. In ancient times, there was no differentiation between law, religion, and custom. The legal and justice system of the Kirat period can be understood from the Kirat Veda viz “Kirat Mundum.” Mundum was just like the four Vedas of Aryans. The early sixth century B.C. has been interpreted as the initial period of Kirat reign in Nepal. In early Kirat society, the Mundum was the only law of the state.

Many of the rules were based on the social customs, traditions, culture, values, and religion during the reign of Lichhivis as well. Traditional concepts of fairness and impartiality under the laws of religion were the basic rules of justice. The kings of subsequent dynasties began to promulgate laws with the advice of the *dharmadhikara* (the owner of justice) and pundits. Prior to the unification of Nepal in 1768, the whole system was governed by Hindu religious texts and local customs.

III. RELIGION IN NEPALESE LAWS AFTER THE UNIFICATION OF NEPAL

Nepal, a viable political entity as it exists today, came into being during the third quarter of the eighteenth century.⁸ Before its unification, Nepal was divided into several principalities and petty kingdoms.⁹ King Prithivi Narayan Shah of Gorkha laid the foundation for a unified, modern Nepal.¹⁰

7. Ali Riaz & Subho Basu, *The State-Society Relationship and Political Conflicts in Nepal (1768–2005)*, 42 J. ASIAN & AFRICAN STUDIES 123, 135–36 (2007).

8. D.R. REGMI, *MODERN NEPAL: RISE AND GROWTH IN THE EIGHTEENTH CENTURY* (1961).

9. *Id.* at 1–8.

10. *Id.* at 45.

Before the unification of Nepal, the common features among the principalities included: the recognition of law based on the *dharmashasthra* viz Veda *smirities*, *puranas*, commentaries, and the issuance of *nibandha* usage customs *sanads* where *dharmashasthra* usage customs were silent on the situation.¹¹ The king was the foundation of law and justice; however, King Prithivi Narayan Shah assigned the responsibility of justice to the *dharmadhikari* (the owner of justice).¹²

Both the trial and appellate courts were at the center of the justice system. In all provincial and district level courts, pundits of the Brahmin caste were appointed as representatives of *dharmadhikari* who were responsible for applying the law and religion in all relevant cases.¹³ However, the justice system simply ignored the principle of equality. The caste system prevailed and criminals continued to be treated in accordance with their caste status. Although the king delegated the responsibility of justice, the king and his descendants continued to rule the country with the help of the royal edicts' (*panjapatra*) customs, conventions, moral law, local custom, and religious instruments. Before the codification of the country code, the laws were based on Hindu religious texts and practice, while village chieftains, pundits, and local landlords carried the responsibility of settling disputes.¹⁴

Before codification, there were also many other legal charters in the form of *sanads*, *sawal*, *lalmohar*, and so on. Jung Bahadur Rana, an ambitious and shrewd courtier, installed the Rana regime in 1846.¹⁵ Rana made the position of Prime Minister a hereditary position in the Rana family and maintained the status quo in every field.¹⁶

However, it is his visits to England and France in 1850 that appear to have had a lasting effect on the Rana regime and the country of Nepal.¹⁷ The English and French court structure, the

11. *Id.*

12. *Id.* at 293–302.

13. *See id.* at 294.

14. *Id.* at 301.

15. *See* LEO E. ROSE & JOHN T. SCHOLZ, NEPAL: PROFILE OF A HIMALAYAN KINGDOM 27 (1980); *see also* HISTORY OF NEPAL 55–58 (Daniel Wright ed., Munshi Shew Shunker Singh & Pandit Shri Gunanand trans., 1972).

16. *See* ROSE & SCHOLZ, *supra* note 15, at 27; RISHIKESH SHAHA, AN INTRODUCTION TO NEPAL 139–40 (1975).

17. SHAHA, *supra* note 16, at 132.

Napoleonic Code, and the Civil Code of France all influenced him.¹⁸ During his visits, he was impressed by the governmental institutions and their functions within society.¹⁹ After his return from Europe, he began to review the laws of Nepal and in 1851 he appointed a Law Council (Ain Kausal) to help prepare and institute a unified country code. After three years, on January 5, 1854, the Ain Kausal established the first country code.²⁰ The Country Code (Muluki Ain) of 1854 had 163 chapters and covered about 1400 pages. It dealt with criminal and civil laws, and provided provisions relating to administrative law, land law, regulation for the management of revenues administration, and land survey. In addition, the Country Code of 1854 incorporated the rules, customs, laws, and royal proclamations; made the provisions of legal status of untouchability a punitive action; and legalized caste-based discrimination in Nepal. The Country Code of 1854 was the first code of modern Nepal based on Hindu jurisprudence that had incorporated the diverse caste system and ethnic groups of Nepal in the framework of a national caste hierarchy.²¹

The Country Code of 1854 embodied all the scattered customs, laws, usages, and social norms of Nepal. The preamble mentioned that the Code came into existence for the purpose of bringing uniformity to the country's legal administration.²² Since 1854, the Country Code has been modified and redrafted from time to time.²³ In fact, it has undergone up to thirteen amendments, both major and minor. It remained the main source of law in Nepal for 110 years until 1963 when it was replaced by the Country Code (Muluki Ain) of 1963.²⁴

18. *Id.* at 134.

19. *See id.*

20. Krishna Kant Adikhari, *Criminal Cases and Their Punishments Before and During the Period of Jang Bahadur*, 3 J. INST. NEPAL & ASIAN STUD. 105, 106 (1976).

21. Anne de Sales, *The Kham Magar Country, Nepal: Between Ethnic Claims and Maoism*, 19 EUR. BULL. HIMALAYAN RES. 41, 44 (2000).

22. *See* ROSE & SCHOLZ, *supra* note 15, at 29–30.

23. *See id.* at 29.

24. BHARAT RAJ UPRETI, *LATEST TRENDS AND DEVELOPMENTS IN INSOLVENCY LAW IN NEPAL I* (2006), available at <http://www.oecd.org/dataoecd/43/23/38184748.pdf>.

IV. RELIGION IN NEPALESE LAWS AFTER 1951

The revolution in 1951 overthrew the Rana regime and introduced multiparty democracy in the country for the first time.²⁵ With this political change, the Nepalese legal system also changed—converting from a traditional law-making procedure and adjudication system to a Western system. Nepalese constitutional law, along with the legislative, executive, and judicial branches, was organized in appropriate fashion.²⁶ After 1951, various areas of the law were revamped including private law, public law, criminal law, constitutional law, administrative law, contract law, commercial law, and private property. Changes occurred in the practice areas of investigation, prosecution, and adjudication. Nepalese legal structure began addressing socioeconomic justice, fair society justice, equality, rules of law, just law, and fraternity.²⁷

The Country Code of 1963 was based on the principle of legal equality and removing caste and religious consideration.²⁸ It provided a common criminal and civil code, equally applicable to Hindus, Buddhists, Muslims, and others in matters such as marriage, adoption, inheritance, and succession. The Country Code of 1963 codified all the laws of Nepal—civil, criminal, religious, and customary, and abolished all types of discrimination and untouchability. The code also recognized customary rules and practices of certain indigenous communities. Additionally, the Country Code of 1963 prohibited converting another person from one religion to another. Under the code, if anybody attempted to convert the religion of another, he or she was to be punished with three years imprisonment and if anybody successfully converted another, he or she was to be punished with six years strict punishment. If the person was of foreign nationality, he or she was to be expelled after serving six years.

25. NAVIN MISHRA, *NEPAL: DEMOCRACY IN TRANSITION* 5 (2006); JOHN WHELPTON, *HISTORY OF NEPAL* 86–99 (2005).

26. MISHRA, *supra* note 25, at 5–7.

27. *Id.* at 6.

28. See WORLD ORGANISATION AGAINST TORTURE, *NEPAL: VIOLENCE AGAINST DALITS OF AN INTER-CASTE MARRIAGE* (2004), available at <http://www.omct.org/index.php?id=SCR&lang=eng&articleSet=Appeal&articleId=4656>.

V. RELIGION IN THE CONSTITUTIONS OF NEPAL

The Constitution is the supreme and fundamental law of the land. The term “Constitution” normally refers to a document having a special legal sanctity that sets out the framework and the principal functions of the organs of the state. It also declares the principles governing the operation of these organs. A constitution is legally binding on the state and all subjects within it. In Nepal, six constitutions have been promulgated since 1948²⁹ and a seventh constitution is currently under construction by the constituent assembly.³⁰

The first three constitutions of Nepal were the Government of Nepal Act of 1948,³¹ the Interim Government of Nepal Act of 1951,³² and the Constitution of the Kingdom of Nepal of 1959.³³ These constitutions guaranteed fundamental rights and protected their enjoyment through the due process of law. They contained directive principles of state policy where the rule of law was assured. They provided the citizen of Nepal with freedom of person, speech, assembly, and worship,³⁴ but they did not mention anything about religious freedom or anything regarding any religion.

In 1962, the king dismissed the parliamentary system and introduced the less democratic “Panchayat System.”³⁵ Ultimately, on December 16, 1962, a new constitution was promulgated which laid the foundation of Panchayat democracy in the country. It was considered a constitutional innovation, essentially Nepali in character and spirit. While introducing the system, King Mahendra claimed the Panchayat System had its roots in the soil of the country and was capable of growth and development in the prevailing climate. Some claimed that the constitution was nationalist in background and democratic in its tendency.

29. SUPREME COURT OF NEPAL WEBSITE, JUDICIARY IN NEPAL, <http://www.supremecourt.gov.np/main.php?d=general&f=preliminaries> (last visited Sept. 25, 2010).

30. *New Nepal Constitution to Be Ready by May 2010*, REUTERS INDIA, Nov. 17, 2008, available at <http://in.reuters.com/article/topNews/idINIndia-36536720081117>.

31. MISHRA, *supra* note 25, at 4.

32. *Id.* at 6.

33. Chronology of the Nepalese Constitutions, http://nepalresearch.com/sai/documents/nep_constitutions.pdf.

34. MISHRA, *supra* note 25, at 4.

35. *Id.* at 11–12.

Basic fundamental rights and due process of law, except the right to form political organizations, were granted to the people. The 1962 Constitution of Nepal declared for the first time that Nepal was an independent, indivisible, and sovereign monarchial Hindu State.³⁶ The 1962 Constitution had mentioned that the word “His Majesty” means “His Majesty the King for the time being reigning, being descendant of the Great King Prithivi Narayan Shah and adherent of Aryan culture and Hindu religion.”³⁷ The Constitution also gave fundamental rights to religion, granting every person with the freedom to profess and practice his own religion as handed down to him from ancient times having due regard to traditional practices. It provided, however, that no person was entitled to convert another person’s religion.³⁸

The 1962 Constitution of Nepal was replaced by the Constitution of the Kingdom of Nepal of 1990.³⁹ The Constitution of the Kingdom of Nepal of 1990 introduced the multiparty parliamentary system in the country, with the provision of declaring the country a Hindu kingdom and including the prohibition on conversion of one religion to another remained intact.

After the success of the People’s Movement of 2006, the Constitution of the Kingdom of Nepal of 1990 was repealed and the Interim Constitution of 2007 was introduced.⁴⁰ Article 3 of the Interim Constitution of Nepal declares: “Having multi-ethnic, multi-lingual, multi-religious, multi-cultural characteristics with common aspirations, and being committed to and united by a bond of allegiance to national independence, integrity, national interest and prosperity of Nepal, all the Nepali people collectively constitute the nation.”⁴¹ Article 4 of the Interim Constitution declares that the state of Nepal is “an independent, indivisible, sovereign, secular, inclusive and fully democratic State.”⁴² Furthermore, Article 23 of

36. THE CONSTITUTION OF NEPAL, 1962, pt. 1, § 3(1), *available at* <http://www.ccd.org.np/pdf/Constitution%201962.pdf>.

37. *Id.* art. 20(1).

38. *Id.* art. 14.

39. Michael Hutt, *Drafting the Nepal Constitution, 1990*, 31 ASIAN SURVEY 1020–39 (1991).

40. PADMA PRASAD KHATIWADA, *FEDERALISM, CONSTITUTIONALISM AND DEMOCRATIC GOVERNANCE IN MULTICULTURAL SOCIETIES (A CASE OF NEPAL)* (2007).

41. THE INTERIM CONSTITUTION OF NEPAL, 2063 (2007), pt. 1, art. 3.

42. *Id.* art. 4.

the Interim Constitution provides the right to religion as a fundamental right as follows: First,

Every person shall have the right to profess, practise and preserve his or her own religion as handed down to him or her from ancient times paying due regard to social and cultural traditions. Provided that no person shall be entitled to convert another person from one religion to another, and no person shall act or behave in a manner which may infringe upon the religion of others.⁴³

Second, “[e]very religious denomination shall have the right to maintain its independent existence, and for this purpose to manage and protect its religious places and religious trusts, in accordance with law.”⁴⁴

VI. CONCLUSION

The Interim Constitution declares that Nepal is a secular state, and it also guarantees the rights of each citizen to profess, practice, and preserve his or her religion.⁴⁵ Yet, the Interim Constitution prohibits the right to convert to a different religion.⁴⁶ Thus, the Interim Constitution guarantees only the right to profess and practice one’s own religion to the extent it does not infringe upon the religion of another, and it completely prohibits the conversion from one religion to another. As such, it is apparent that the Interim Constitution does not provide for the right to choose the religion of one’s own choice.

Beyond these constitutional and other statutory provisions, Nepal is a party to various international human rights instruments that are binding in Nepal. The Nepal Treaty Act of 1991 explicitly provides for the primacy of international treaties over national laws.⁴⁷ Thus, in order to further understand the law governing religious freedom in Nepal, it is necessary to analyze some of the key

43. *Id.* pt. 3, art. 23(1).

44. *Id.* art. 23(2).

45. *Id.* pt. 1, art. 4(1); *id.* pt. 3, art. 23(1).

46. *Id.* art. d23(1).

47. International Human Rights Instrument, *Core Document Forming Part of the Reports of State Parties: Nepal*, U.N. Doc. HRI/CORE/1/Add.42 (June 14, 1994).

provisions of the Universal Declaration of Human Rights⁴⁸ and the International Covenants on Civil and Political Rights.⁴⁹ Specifically, Article 27 of the International Covenant on Civil and Political Rights declares that in states in which ethnic, religious, or linguistic minorities exist, a person belonging to such a minority shall not be denied community rights to enjoy his or her own culture, to progress and practice his or her own religion, or to use his or her own language.⁵⁰ Likewise, Article 18 of the Universal Declaration of Human Rights has declared that all have the right to the freedom of thought, conscience, and religion, or belief in teaching, practice, worship, and observance, either alone or in a community, in public or private.⁵¹ Accordingly, this provision, which ensures the freedom to change one's religion, directly contradicts the provision of Article 23(1) of the Interim Constitution⁵² and the chapter on etiquette (*adal*) of the Country Code of 1963, which prohibits conversion from one religion to another.⁵³

Although constitutionally Nepal is a multicultural and multi-religious secular country, the separation of religion from the state-professed philosophy of secularism is not evident. Nepalese social structure is still based on and guided by the old values, norms, customs, and rituals of the Hindu religion. Although the overwhelming majority (80.6%) of people in Nepal professes to be Hindu, the Interim Constitution of Nepal fails to establish a wall or partition between religion and state. Thus, Nepal is not a secular state (with complete separation of religion from the state) as understood in the West. Nepal is not, however, a theocratic country because none of the essential characteristics of theocracy are found in Nepal.

Democracy in Nepal, as structured by the Interim Constitution, incorporates the philosophy of secularism and a secular state. Yet, the ideology of secularism or the secular state in the Constitution is

48. Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

49. International Covenants on Civil and Political Rights, G.A. Res. 2200A, at 52, U.N. GAOR, 21st Sess., U.N. Doc. A/6316 (Mar. 23, 1976).

50. *Id.* pt. IV, art. 28.

51. Universal Declaration of Human Rights, *supra* note 48, art. 18.

52. THE INTERIM CONSTITUTION OF NEPAL, 2063 (2007), pt. 3, art. 23(1).

53. Nepal National Country Code of 1963.

influenced by the historical and social background of Nepal, which is largely different from the western world. The Interim Constitution is not anti-god or antireligious. Rather, it recognizes that religion has relevance and validity in the lives of many, though not necessarily all, citizens. Furthermore, it also emphasizes that while religion may be relevant in life, it cannot frustrate the progress of democracy in its allotted task of creating a new secular order in Nepal. Yet, a doctrine of secularism dedicated to creating a new social order founded on justice is currently limited in Nepal by the restrictions imposed upon the exercise of the right to freedom of religion.

The idea of secularism has been important in the social and political development of Nepal beginning with the People's Movement for democracy. Following the success of the People's Movement, secularism has, however, acquired a new emphasis and poses many difficult problems as the next step for the ideology of secularism is its transformation into practical principles and formulations capable of implementation through the choice of community values.

As the Constitution continues to make progress, the law and legal theory in Nepal should make efforts to forge new approaches that support the development of general moral consciousness and, at the same time, accept all religions and uphold a state that will support and treat all religious communities equally.